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FOREWORD: STILL UNFINISHED, EVER UNFINISHED

ANITA BERNSTEIN*

For decades popular commentators—and even scholars—have been proclaiming that feminism has run out of ideas and purpose.¹ The line is certainly familiar: most progressive movements receive this kind of premature interment from their wishful-thinking enemies. But critics of feminism go further than most antiprogressives, both in the diversity of their attacks and their bold claim that, having outlasted its useful life, feminism now actually impedes the well-being of women.

Some accuse activists of whining, and keep alive the phrase “victim feminism.” Some use what they like to call “evolutionary psychology” to argue that the reason women have less money and power and public honor than men lies not in their culture but in the inherent nature, or tendencies, or strategies of women, all of which keep them out of various markets and competitions:² Feminism cannot overcome the destiny that originates in female anatomy. Others seize the future as antifeminist, claiming that younger women of today are very different from the famed heroines of the movement, and if age separates women from one another, then the unitary claims of feminism about women become less urgent.³

Such attacks come approximately from the right. But the left too has its quarrels with feminism. In past decades, left-wing anti-feminism claimed to be a matter of priorities: first the revolution, the class struggle, and so forth; women could wait. More recently leftists have faulted the movement for its interest in the line between men and women. Feminism is wrong, goes the charge, for proceeding as if

* Thanks to Katharine Baker for helpful editorial advice.

1. Martha Chamallas notes a “conventional wisdom . . . that gender discrimination is largely a thing of the past and that feminism, as we have known it, can provide little help to those women trying to cope with the debilitating effects of sexual bias.” MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 307 (1999); see also Orit Kamir, *Feminist Law and Film: Imagining Judges and Justice*, 75 CHI.-KENT L. REV. 899, 899 (2000) (referring to the desire to append “post” to the word feminism).

2. See Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 805 (2000).

3. See RENE DENFIELD, THE NEW VICTORIANS: A YOUNG WOMAN’S CHALLENGE TO THE OLD FEMINIST ORDER 10-11 (1995).

there were two and only two genders, as if race and class did not shape and divide women, or as if justice could be achieved through reference to transcendent Enlightenment principles.⁴

This chorus of weary futility misdescribes a social movement whose strength continues to grow—a force that can inform other crusades and explain what works in American public policy, at the level of both theory and practice. Detractors cast feminism as orthodox, passé, and trite, but it is they who espouse what is now the conventional wisdom. When writers trivialize and demonize feminism—“it no longer matters” comes out of one side of their mouth and “it’s pernicious” out of the other—these judgments tend to escape public questioning and refutation. Anyone who would celebrate feminism as vital and current takes a defiant posture.

Celebrate what, exactly? Academic lawyers make a ritual of defining their terms up front, and a law-review symposium on unfinished feminist business is no occasion for an exception to this custom. Let us begin, then, with a working definition of feminism. I like one propounded by political philosopher Susan Moller Okin: feminism to Okin is “the belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equal to that of men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can.”⁵ While not free from controversy, definitions like this one, which avoid making claims about female inclinations (toward care, empathy, nurturing, and the like), offer the virtue—beloved to liberals like Okin and me—of a certain parsimony: many feminists hope that women will achieve (or be celebrated for) more than dignity, equal opportunities to achieve fulfillment, and the removal of socially enforced disabilities for women. But in order to call itself a women’s movement, feminism can aspire to no less. Rooting the working definition in “liberal feminism”—a phrase often used pejoratively⁶—permits a wide range of views to join this Symposium.

“Unfinished business” distinguishes this Symposium from its *Chicago-Kent Law Review* predecessor, *Is the Law Male?*,⁷ and other general-interest collections of essays on feminism, because it excludes

4. A classic is ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

5. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 9, 10 (Joshua Cohen et al. eds., 1999).

6. See CHAMALLAS, *supra* note 1, at 44-46 (defending “liberal feminism”).

7. *Symposium: Is the Law Male?*, 69 CHI.-KENT L. REV. 293 (1993).

numerous feminist subgenres of great interest. The unfinished business of this Symposium includes no comparative studies, no quantitative findings, and no scholarly reinterpretations of such twentieth-century movements as contemporary psychoanalytic theory and poststructuralism. Narrative, autobiography, and literary or artistic expressions of feminism also lie outside the unfinished-business boundary.

Addressing unfinished feminist business, then, each essay of the Symposium presents a unique call to action, as well as an intellectual stance. My own taste for policy and praxis, coupled with a belief that law (with its pragmatic inclinations) cannot be eliminated by fiat from the pages of a law review, dictated this preference for movement over rumination (although, as about half the contributions will argue, unfinished feminist business includes the need to reassess or criticize various intellectual and theoretical fixtures) and a focus on the near-term future. Support for this editorial choice will emerge from the writings that follow.

Before you begin to read them, you might find it helpful to know how these thirteen works were obtained, as their manner of collection yielded a somewhat unexpected result. Essays reached the Symposium by two means. A majority were written in response to my invitation: "What do you, from your vantage point, think is unfinished feminist business?" Or sometimes, "What do you think is *the most important element* of unfinished feminist business?"—my inexact way of inviting a writer to designate one neglected, undervalued, or out-of-fashion pursuit, or perhaps to raise a subject misperceived as extrinsic or peripheral to feminism. Most of my invitations reached writers known to have produced impressive work in what one might call "feminism plus": that is, the ability to combine a feminist perspective with another area of expertise. The feminism-plus strategy strove to bring together a variety of thinkers with a common interest in feminism plus a separate interest in something distinct, thereby providing readers with both divergence and common ground.

Other contributions arrived *qua* essays rather than in response to my perception of an author's scholarly reputation. When I'd learn about a work in progress, or a manuscript not yet committed anywhere for publication, that seemed integral to the Symposium, I'd ask the writer to consider contributing it to these pages. Happily the essay-based invitations yielded a good turnout, and familiar voices thus mingle with newer ones, in a conversation that any host would

want to foster at her table.

Like all collections, the Symposium can be appreciated as both parts and a whole. Its parts require little by way of preface: the writers, all articulate thinkers, will speak for themselves presently. In the aggregate they make another point, an insight that changed my own provisional understanding of "unfinished feminist business." One might have thought that the phrase had some kind of unitary meaning. From these Essays, however, feminist business emerges as unfinished in two distinct, contrasting senses. The first sense in which feminist business is unfinished is that particular work is still not complete. The second sense, which I hadn't anticipated, is that a particular project illustrates that feminist business will never be complete.

Kate Millett launches our discussion, asking *What Is to Be Done?*⁸ From her unique vantage point as a famed second-stage visionary, Millett begins by offering a short and witty survey of the contemporary feminist movement. She then nominates one course of action as, in her view, the most necessary piece of unfinished feminist business. Rather than analyze her choice here in this Foreword, I simply classify it: Millett has raised a question and proposed an answer. Several of the participants—just over half by my reckoning—have also chosen to declare a path, or a remedy, or a goal to keep in mind, while they note that the business of feminism is still unfinished. Other participants favor a different, almost contrary, outlook. For them feminism is not so much "still unfinished" as "ever unfinished": a defining characteristic of feminism is that it never comes to rest.

I.

Essays in the first part of the Symposium may put a reader in mind of the feminism

that defines itself as the unfinished business of humanism, stresses the common human elements of experience, attacks the culturally created and reinforced concepts of femininity and masculinity as opposed to biological male and female, and argues for the androgynous ideal of all individuals achieving their own best selves irrespective of gender.⁹

Bonnie Lyons, a specialist in contemporary American fiction, thus

8. Kate Millett, *What Is to Be Done?*, 75 CHI.-KENT L. REV. 659 (2000).

9. Bonnie Lyons, *Faith and Puttermesser: Contrasting Images of Two Jewish Feminists*, in TALKING BACK: IMAGES OF JEWISH WOMEN IN AMERICAN POPULAR CULTURE 139, 140-41 (Joyce Antler ed., 1998).

defines the feminism of literary titan Cynthia Ozick, known for her antipathy to being called a woman writer.¹⁰ This “androgynous ideal,” associated with liberal feminism, is for Lyons an instance of unfinished business. Humanism encompasses feminism and would share all of its rigors and priorities, if only humanists would realize the extent of their liberatory vision. Instead this movement has stopped short, recognizing the ideal of humanity but not fully acknowledging the humanity of women. Without contending that the Essays of the first part endorse this approach to feminism, I would describe their agendas as congruent with it.

In this sense of the term, “unfinished feminist business” knows what it needs to do and where it is going. An agenda has been in place since the formation of second-stage feminism in the early 1970s. This contemporary version of feminism came into being when, as was mentioned, women activists realized that their colleagues in the Left were marginalizing, postponing, and positing-out the job of women’s liberation in the name of antiwar and civil rights priorities—as if the content of the antiwar and civil rights movements did not *of themselves* demand freedom and justice for women.¹¹ Against this backdrop of social change, feminism notes the need to change more.

Now, decades later, two writers in the Symposium continue the same task by challenging the still-fashionable construct of postmodernism: Kelly Kleiman brings one specific indictment to our table,¹² while Catharine MacKinnon attacks postmodernism as ideology, deeming it antagonistic to feminism as a movement and to women as human beings.¹³ (Later we will hear from other participants, situated in the “ever unfinished” half of the Symposium dichotomy, who regard postmodernism with more affection.) These first two Essays hew to a line. Oriented as they are toward the goal of antisubordination, Kleiman and MacKinnon will not let smoke and contingency conceal what they declare to be basic premises about gender and oppression. “I have a woman’s psyche, formed by my experience of being morphologically, biologically, sexually, and socially a woman,”¹⁴ Kleiman writes, knowing well that some would

10. See *id.* at 141 (noting that Ozick titled one of her satirical early stories *Virility* to mock the excessive attention paid to a writer’s gender).

11. See Robin Morgan, *Goodbye to All That*, in *FEMINISM IN OUR TIME* 148, 149 (Miriam Schneir ed., 1994).

12. Kelly Kleiman, *Drag = Blackface*, 75 CHI.-KENT L. REV. 669 (2000).

13. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687 (2000).

14. Kleiman, *supra* note 12, at 682.

contest the point.¹⁵ Writing as a woman interested in the plights and prospects of women, Kleiman applies what Katharine Bartlett has called one of several feminist legal methods: she looks at one social practice, performance drag, and asks “the woman question.”¹⁶ Kleiman concludes that performance drag—the prescriptive, coercive, and reductionist appropriation of femininity by men, in public—is just as pernicious as, and ought to be no more respectable than, blackface. Her Essay adds to the large literature—academic and popular, legal and extralegal—about the ground held in common by race and gender.

In rejecting the drag-will-liberate-us-all-from-gender thesis that still holds sway in the academy and elsewhere, Kleiman implicitly denies what some postmodernists appear to have claimed, that a posture is no more or less good or true than (what individuals perceive as) reality. As Kleiman points out, should RuPaul ever become vexed by pay inequality or glass ceilings or domestic violence, he can always abandon his phony-woman persona, while Kleiman as a real woman has no choice but to change the oppressive social condition in question. And what Kleiman states implicitly, Catharine MacKinnon declares in so many words.

MacKinnon indicts postmodernism on several charges. Whereas feminism commits itself to knowing, naming, demonstrating, and denouncing practices that hurt women—a task that frequently calls for great bravery—postmodernism, having made an enemy out of reality itself, dismisses and disparages these efforts. Despite strong evidence that subordination of women is close to a cultural universal, some postmodernist tendencies deny that the term “woman” has meaning.¹⁷ If there is no such thing as a woman, there must be no such thing as the subjection of women; and perhaps the fact of the Holocaust or the Bosnian rape campaign is just an option, to click or not click, on our remote-control channel-changer. When postmodernism isn’t working to defeat feminism, MacKinnon continues, it is stealing from feminism, claiming as its own such insights as the critique of universality and the idea of social construction. To MacKinnon, then, unfinished feminist business

15. See MacKinnon, *supra* note 13, at 694-95; see also KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 1077-90 (2d ed. 1998) (exploring conflicting feminist interpretations of the term “woman”).

16. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837-49 (1990).

17. See *supra* note 15 and accompanying text.

includes the reclamation of stances and practices disparaged by postmodernists as old-fashioned, if not wrongheaded. It will take tenacity to honor MacKinnon's antisubordination ideal in any milieu (such as the academy) where pomo-fashion adorns, or is at least consistent with, conservative politics.

Elsewhere in the Symposium, writers pursue a similar vigilance. While MacKinnon and Kleiman cast a suspicious eye on gender-bender trendiness, other writers express doubts about the adequacies of reforms effected at around the same time. They advocate what might be called "re-reform." Feminism demands a reassessment of recent landmarks. Has a reform backfired? Not gone far enough? What about unintended consequences? This view, consistent with the Ozickian approach to feminism, assumes that humanists, usually in partnership with feminists, have effected some change: it is now the business of feminism to revisit and refine these earlier efforts.

The task is one of focus, unity, crystallization—a clear distinction between what is trivial and what lies at the center. Of the participants in this Symposium, Penelope Bryan has put the point most starkly. "While I respect the intellectual fertility that the different strands of feminism represent," she writes, "I urge all feminists to work to set aside their theoretical and policy differences and develop a cohesive political agenda regarding women's issues in divorce. Although we may want to deny it, we are engaged in an intense struggle with men, a struggle with strong implications for our future."¹⁸ *Reasking the Woman Question at Divorce* looks at women in a discrete moment, a time when their gendered condition puts them in peril, and asks feminists to identify with this crisis: in particular, to help these women keep custody of their children. This advocacy is a subset of reform—even though "divorce reform" has not always been feminist, and unfortunately includes the fathers' rights movement, mandatory mediation of disputes within families, covenant marriage, and heavy-handed pressure for joint custody. According to Bryan, an expert in divorce law, feminists must survey the menu of divorce reforms carefully, with attention to their consequences.

Unlike Cynthia Ozick, then, Bryan does not pursue an "androgynous ideal"; and yet these two feminists share an insistence that the agenda for feminists is straightforward and even (relatively) simple. Bryan implicitly views feminism as the pursuit of women's

18. Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 743 (2000).

interests (or, perhaps, their claims to justice) in a gender-stratified and unjust society. Here unfinished feminist business means discerning the core, looking away from the distracting periphery, and knowing a destructive new idea when you see one.

Indeed, unfinished feminist business, to many writers of the Symposium, calls for *old* ideas and solutions. For Richard Kamm, the familiar questioning of the women's movement as exclusionary, elitist, and overconcerned with the needs of white professional women has not been superseded or rendered obsolete.¹⁹ Kamm brings to the Symposium his longstanding interest in, and familiarity with, the life-circumstances of female migrant workers. These women are exploited, vulnerable, and almost invisible in the lowest reaches of agricultural labor.²⁰

Similar to Penelope Bryan's analysis of the divorce-reform agenda, *Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker Women* associates feminism with the unacknowledged needs and interests of vulnerable women.²¹ Kamm takes no potshots at "feminists" for neglecting farmworker women: as he points out, even energetic and sympathetic activists find it hard to work in partnership with an isolated and migratory population, often located far from cities and unable to communicate in English. Instead he suggests a range of measures that the women's movement, which he presumes to be interested in the plight of female migrant farmworkers, could take to improve these hard lives. This unfinished business, Kamm notes in his title, would extend existing progress: when they become both objects of current reform plans (some of which Kamm finds very promising) and subjects who state their own agenda and speak for themselves, migrant farmworker women will acquire a full civic humanity.

This humanistic approach to feminist business continues in the Symposium. Next comes Lila Lee, who also relates an old idea that remains new, unfinished in its promise: like Penelope Bryan's thesis, it might be phrased as *harm to women matters*.²² Like Penelope Bryan, Lee implicitly defines feminism as the pursuit of women's situated interests; she also recognizes, as does Bryan, that feminists as

19. Richard Kamm, *Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker Women*, 75 CHI.-KENT L. REV. 765 (2000).

20. *See id.*

21. Compare Bryan, *supra* note 18, with Kamm, *supra* note 19.

22. Lila Lee, *FACT's Fantasies and Feminism's Future: An Analysis of the FACT Brief's Treatment of Pornography Victims*, 75 CHI.-KENT L. REV. 785, 785-86 (2000).

a group do not yet unite around her point. Following a tradition in law reform, Lee returns to a long-concluded litigation and educes from it a current agenda for change. (Recall the role of *Plessy v. Ferguson* in the civil rights movement during the 1940s.) Although Lee happens to disagree with the Seventh Circuit's holding in *American Booksellers Ass'n v. Hudnut*,²³ her target in *FACT's Fantasies and Feminism's Future* is not the judicial decision but rather a "quintessential and definitive statement of liberal feminists on pornography"—that is, the amicus brief that a group called the Feminist Anti-Censorship Task Force, or FACT, filed in the action.

Accessible to readers in a law review and still frequently cited, the FACT brief is for Lee a vital and living antagonist. Lee faults the FACT brief, and by extension the view of pornography expressed by such feminists as Nadine Strossen (and Kate Millett, present at this Symposium, who gave the FACT brief one of its most esteemed signatures), for operating to deny the reality of harm to women *qua* women. Robin West and other feminists have contended that the law has let women down chiefly by failing to recognize—let alone ameliorate—the gender-specific harms that they suffer.²⁴ If pornography is one such source of harm, then FACT's victory within the judicial system is an important illustration of the need to reorient law to what West has identified as its principal function for both men and women: "to minimize the harms we suffer in social life."²⁵ Versions of feminism that keep a fastidious distance from the experience of suffering must be replaced, Lee argues, with a respect for women's testimony about harm. This testimony, offered two decades ago in Indiana and Minnesota, is still unrefuted—and still inadequately heard.

To put Lee's point more generally: an idea will have consequences, and feminism has to respond to these outcomes. Political liberalism thinks very highly of free speech, as Lee notes; but it has been equally concerned with the problem of preventable or remediable harm.²⁶ When liberals allow the former priority to overwhelm the latter in a way that women get hurt, feminists ought to

23. 771 F.2d 323 (7th Cir. 1985).

24. ROBIN WEST, *CARING FOR JUSTICE* 97 (1997); see also Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 L. & SOC. INQUIRY 477, 479 (1999).

25. WEST, *supra* note 24, at 94.

26. See Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1305-12 (1998).

be moved into action. Katharine Baker continues this ideas-have-consequences motif.²⁷ Her study of sociobiology—perhaps the most powerful intellectual bludgeon of all those currently used to enforce the subordination of women—approaches a perceived antagonist with some affability. Just because partisans of the status quo favor references to biology when they argue that women's socially inferior status is inevitable and should continue,²⁸ Baker argues, it does not follow that feminists must concede that biology is a discipline that belongs only to their foes.

Long interested in the phenomenon of human fluidity or mutability as it relates to law reform,²⁹ Baker in *Biology for Feminists* identifies considerable agreement between feminist and biological perspectives on such legal categories as rape, marriage, and parenthood. Both evolutionary biologists and feminists often see the world as harsh if not ruthless, riven by strife and violence. But neither approach makes the error of concluding that because things are as they are, they cannot change. This mistake belongs to the misinterpreters of biology. Static (not to say reactionary) understandings of evolutionary psychology do not come naturally from the science itself. Biology means life; life means change. Cultivated social change is the prerogative of all organisms that can understand their societies. And thus Baker—like the other six writers in the first part of the Symposium—moves from theoretical insight to a plan for action.

II.

If I could go back a year and do the invitations again, I would make sure that at least one African-American writer joined the Symposium. At the point when three invitations to such scholars were out—each African-American invitee having articulated both her interest in participating and the heavy writing commitments on her calendar—I became imprudently confident that the goal of inclusion would be fulfilled. Although news of the third decision to decline

27. See Baker, *supra* note 2.

28. See, e.g., Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995).

29. See, e.g., Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523 (1998) (arguing that orientations toward both autonomy and connection can and should be influenced by environment); Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999) (advocating a campaign to revise attitudes and perceptions about, as well as inclinations toward, rape).

came too late for me to extend more invitations, I take responsibility for this result, because I could have prevented it with more careful planning.

It is hard to specify precisely what I mourn. What is "this result"? A lost forum for someone's writing? Yes, but there are many others. The risk of provoking yet another critic to say again that "feminists" means white female narcissists still (despite all those reproaches) unaware of, or callous about, their tendency to exclude on the basis of race? Most iterations of this complaint originate in bad faith rather than anyone's sincere enthusiasm for racial progress.³⁰ A silenced dialogue, a conversation foregone? None of the contributors forfeited any "live" exchanges, as the Symposium took place only on paper. Is it the substance, the text, of what a writer of color would have written? But surely this lost content is no more predictable, or even amenable to classification, than any other unwritten essay.

This unsettled, ambiguous conclusion is not personal to me, and it extends beyond an editorial judgment. Readers can find it throughout the Symposium (and throughout feminist legal thought generally), especially in the Essays of the second part. Continuing this thread, I would argue that African-American feminist thinkers are with us indirectly: it is they who have been preeminent in expressing feminism as inherently contingent or, to use the phrase I favor here, ever unfinished. In *Black Feminist Thought*, one of several such contributions, Patricia Hill Collins describes an ideal of feminism as congeries, or a pluralistic coming-together of different sectors, where "each group perceives its own truth as partial, its knowledge as unfinished."³¹ Later feminist works have synthesized and expanded on this description.³²

Essays of this second part of the Symposium work with the variable, shifting version of feminism that Collins champions. Whereas, for example, Penelope Bryan sorts good reform proposals from bad ones, another reformer, Victoria Nourse, argues that success rides in the same vehicle as failure: strength and weakness are two faces of the same reform coin.³³ The Essays in the first half have

30. See generally MacKinnon, *supra* note 13, at 697-98.

31. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 236 (1990).

32. See BARTLETT & HARRIS, *supra* note 15, at 1100-06 (describing "positionality" and other attempts to articulate the contingent nature of feminist truth).

33. Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal*

grappled with *What Is to Be Done?*—a contention that the Enlightenment agenda is still unfinished. These latter pieces provide six illustrations of the point that feminist business is ever unfinished.

The second-half Essays break into three pairs. The first pair explores a theme of returning to one's old ideas and preoccupations. Unlike some of their predecessors at the Symposium, Jennifer Brown and Tracy Higgins find uncertainty and ambiguity when they revisit theses they had addressed in earlier scholarship. In making revisions, they describe feminist business as a work in progress. Brown's title, *Apostasy?*,³⁴ sums up in a word (plus a punctuation mark) the idea of feminist business as ever unfinished. With the noun, she comments on her decision to retreat partially from "*To Give Them Countenance*," her 1998 endorsement of a separate law school for women students.³⁵ It may be apostasy for someone who believes that a separate law school could work well as a feminist instrument—something that would combat the "alienation, silence, and underachievement"³⁶ that many believe women experience in coeducational law schools—to sacrifice some antisubordination momentum for the purpose of including in the new law school those men who would thrive on terms similar to those that the women students would enjoy there. But with the question mark, Brown retreats a bit in the other direction. Her modification may not be apostasy at all, she writes, even though it creates new opportunities for men rather than women, in that it advances a political vision that would defy gender stereotypes. At the end of the Essay, when Brown leaves the subject (for the moment) of legal education for women away from male classmates, a reader senses that for this careful scholar—a beneficiary, as well as an observer, of single-sex higher education—the question will never quite settle.

Tracy Higgins's measured approval of the public/private distinction in legal and political theory raises another question that is not amenable to one definitive or permanent answer.³⁷ Higgins finds it remarkable that feminist theorizing on the boundary between public and private has been almost monolithic. She calls for more

Law, 75 CHI.-KENT L. REV. 951, 951-53 (2000).

34. Jennifer Gerarda Brown, *Apostasy?*, 75 CHI.-KENT L. REV. 837 (2000).

35. Jennifer Gerarda Brown, "*To Give Them Countenance*"; *The Case for a Women's Law School*, 22 HARV. WOMEN'S L.J. 1 (1998).

36. *Id.* at 5.

37. Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847 (2000).

variety, even instability (in contrast to Penelope Bryan, for instance, who has urged feminists to put differences aside and come together), while at the same time embracing a traditional dichotomy. Higgins sees value in the public/private distinction: it strikes her as descriptively accurate and instrumentally useful. She thinks that some of what feminist theorists attack under the rubric of the public/private distinction is actually a problem of too much power held in private hands. The challenge for feminists is to question this allocation without abjuring privacy and the private sphere, concepts that have been friends to women. Higgins describes the task as one of moving the public/private critique “from the category of ‘foregone conclusion’ to ‘unfinished business.’”³⁸ Like Jennifer Brown’s reassessment of single-sex education, this task will not easily stop needing to be undertaken again.

This exploration of instability and change in feminist legal thought continues with the work of Reem Bahdi and Orit Kamir, younger scholars who seek to take feminist legal scholarship beyond the printed word on the page, and into new media. For Bahdi, the medium is the Internet, “an instrument of paradox.”³⁹ Some writers view the Internet as an infinitely powerful tool that creates new communities, wipes away national boundaries, and weakens all the old vertical hierarchies: nation, church, patriarchy.⁴⁰ Others see a sinister, enervating machine that drains individuals and their culture away from the physical experiences—such as face-to-face contact—that are necessary to their life.⁴¹ Having been trained in law before moving to information technology, Bahdi finds herself reminded of the debate over whether international human rights are of value to the oppressed. Like international human rights, the Internet is abstract, expensive, and associated with literacy and other elite accouterments.

Yet Bahdi would not throw the Internet away. After noting its accomplishments in the field of women’s international human rights, Bahdi concludes that “conscious and constant checking and re-checking is required” to monitor the Internet in this work.⁴² To

38. *Id.* at 848.

39. Reem Bahdi, *Analyzing Women’s Use of the Internet Through the Rights Debate*, 75 CHI.-KENT L. REV. 869, 883-85 (2000).

40. See LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* 26, 224 (1999); Bahdi, *supra* note 39, at 890-92.

41. See Bahdi, *supra* note 39, at 881-82.

42. *Id.* at 897.

Bahdi, the Internet itself is doing the same thing. Referring to her own experiences on the Internet, she quotes with approval Donna Haraway's claim that "the knowing self is partial in all its guises, never finished, whole, simply there and original; it is always constructed and stitched together imperfectly"⁴³—an insight that Bahdi believes derives from the experience of Internet communication, and a comment on ever-unfinished business.

For Orit Kamir the new medium of choice is film.⁴⁴ In *Feminist Law and Film: Imagining Judges and Justice*, Kamir seeks "to broaden the feminist horizon and open up unfamiliar territory" by commending attention to the film *High Heels*, which Kamir views as a dramatization of "caring" (rather than Anglo-American or Solomonic) justice.⁴⁵ Judge Dominguez, a character in the movie, is a man who experiences, intuitively, expresses emotions, engages with facts, and loves his mother—all while doing his job. In its explorations of how to merge the ethic of justice with the ethic of care,⁴⁶ feminist legal thought would be poorer not to reflect on this fictional judge. But Kamir is quick to point out that film is only one of many sources of what she calls "cultural images"⁴⁷ that can inform and buttress legal thought, and that even the vast category of cultural images is just one of several new fronts for feminist growth. Her argument is one of manifest destiny: to Kamir feminist business is so unfinished, and so impossible to finish, that one cannot imagine any facet of society or culture that could not play a role in this expansion.

In contrast to Kamir, who likes to find her feminist legal theory far from the law books, Jane Schacter and Victoria Nourse use more traditional materials to support their separate arguments that feminist business is ever unfinished. They both have particular interest in one subcategory: newly written or reinterpreted statutes. Although these materials are traditional, they generate new conclusions for these writers.

Schacter, noted for pathbreaking scholarship on statutory interpretation, brings this expertise to "second-parent adoption," a process whereby an adult becomes the legal parent of a child *without* the child's parent relinquishing parental rights.⁴⁸ Such adoptions take

43. *Id.* at 884.

44. Kamir, *supra* note 1, at 899-904.

45. *Id.* at 900.

46. See generally WEST, *supra* note 24 (arguing that justice is not possible without care).

47. Kamir, *supra* note 1, at 900.

48. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures, and*

place all the time, even though a requirement of relinquishment or termination is found in many adoption statutes. Courts have interpreted the relinquishment language as containing one obvious exception: When a person who, having married another person who happens to be a custodial parent, wishes to adopt the new spouse's child, *and* the original co-parent presents no obstacle to the adoption (perhaps he consents to it and is willing to relinquish the child; perhaps he is dead or otherwise absent), then surely the custodial parent, the new spouse of the one who seeks to adopt, should not have to relinquish parenthood of her own child. So far so good. But what happens when the prospective adoptive parent is a same-sex partner of the birth parent? The statutes say nothing about lesbian and gay families. Analogical reasoning is indeterminate here: the prospective parent *is* like a stepparent, in that she seeks to rear the child along with the child's birth parent; she *is not* like a stepparent, in that she isn't married.

In defending the solution that most appellate courts have given to this analytical puzzle—yes, the same-sex partner may adopt without relinquishment by the first parent—Schacter unites feminism with theories (hers and others) about the relationship between statutory interpretation and democracy. She argues that as a matter of institutional competence, even a staunch majoritarian would agree that the question of whether a child should be reared in a particular home is one better answered by judges than legislatures; the issue has been delegated to the proper institution. But staunch majoritarianism is not the only possible approach to problems of statutory interpretation. What Schacter calls “thicker democratic values”⁴⁹ call out for bringing gay and lesbian families into public view. Silenced and hidden by both discrimination and violence, lesbians and gay men are not fully present in public. Second-parent adoption rights help to remedy this loss by allowing individuals to live as they are in public—affirming their relationships with both their intimate partners and their children—just as other citizens are permitted to live.

But is it feminist business? Yes. Schacter situates her argument as one of “multiple efforts to create legal and social spaces that can accommodate different lives—including, to name a few, a life in which women do not marry or bear children, in which women raise children without men, or in which same sex couples live or raise

children together,” the feminist task being “to dislodge the normative nuclear family as the only legitimate affiliative structure in which women—and men too—might live.”⁵⁰ The normative nuclear family has been said to oppress women in many respects. It has provided patriarchal authority for men, a curtailed-off sphere where rape and battering become officially unseen and, in the not-distant-enough past, an excuse for deprivations of women’s civil rights such as the franchise and the right to own property or make contracts. Schacter adds enforced heterosexism and disparagement of gay and lesbian parenting to the list. But she has done more than catalogue oppressions; she also offers a vision of expansion. Like Orit Kamir, who speaks of broader horizons and wider territory, Schacter wants to create new spaces. This argument, like Schacter on statutory interpretation, rejects rigidity and ossification in favor of continuous change.

For a complementary perspective on new statutes and their reception among the judiciary and the public, we now turn to the last Essay, contributed by Victoria Nourse. Nourse, a scholar known not only for her legal writings but also as an accomplished legislative counsel, evaluates the achievements and shortcomings of feminist reforms in criminal law.⁵¹ Commentators, especially men not associated with feminism, have been impressed by the achievements of feminism in reforming American criminal law.⁵² Nourse, less easily satisfied, sees “simultaneous success and failure.”⁵³ The paradox of reform is that while the concept of survival ordinarily connotes strength, in order to survive the upheaval of legislative consensus and judicial re-education a feminist reform of the criminal law must be, in a strategic way, weak: Nourse writes of “deliberate ambiguity,” pulled punches that can land someplace near their targets.⁵⁴

Filling the gaps are “norms,” a word that has been much beloved in the legal academy over the last decade or so; Nourse, dissenting, suggests that norms become less benign when they have the power to override the protections and safeguards of criminal law. For example, she writes, one norm holds that the role of “date or wife or colleague”

50. *Id.* at 933.

51. Nourse, *supra* note 33.

52. *See id.* at 951 n.1 (citing George Fletcher and Sanford Kadish as “skeptics” who have been impressed by the achievements of feminist reform); *see also* Gary T. Schwartz, *Feminist Approaches to Tort Law*, in *THEORETICAL INQUIRIES IN LAW* (forthcoming 2000) (manuscript at 42 n.146) (noting that tort law cannot point to similar feminist contributions).

53. Nourse, *supra* note 33, at 951.

54. *Id.* at 959-60.

makes relations “voluntary, consensual, and ‘normal,’ which means no coercion, no rape.”⁵⁵ Victims therefore must engage in very earnest resistance, even after reformers in the jurisdiction have worked hard to eliminate a resistance element in the *prima facie* case of rape. When battered women kill in self-defense, a norm often reproaches them because they should have left, even though hornbook self-defense law contains no duty to retreat before the harm arises: “The man who walks into the dangerous bar for the fiftieth time or walks into a dangerous neighborhood for the eightieth does not lose his self-defense claim because he should have ‘left’ before the knife was above his head.”⁵⁶

Just as she differs with the majority of law-review writers on the subject of norms, Nourse ventures a dissent from the standard feminist notion that recommendations about theory and policy must be rooted in women’s experience. Before battered woman syndrome there was the law of self-defense, whose core concepts (imminence, necessity, and reasonable perceptions of a dangerous situation) not only fit situations where women kill their batterers but also spare these women the burden of presenting themselves in “subjective” terms—that is, as peculiar victims who engage in special pleading. For Nourse “women’s experience” sounds uncomfortably close to social norms about relationship,⁵⁷ a force that defeats reform.

Offering a statement that can serve as an epigraph for the entire second half of the Symposium, Nourse writes that “feminist reforms have a kind of built-in, albeit unpredictable, capacity for failure; like the apple harboring the worm, they harbor the possibility of their own undoing. I say this not because I believe that failure’s normalcy makes reform futile, but . . . because it makes the need for continued reform equally ‘normal.’”⁵⁸

I am delighted to present these thirteen Essays on how feminist business remains still unfinished and ever unfinished.

55. *Id.* at 956.

56. *Id.* at 973.

57. *Id.* at 953-58.

58. *Id.* at 953.

